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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 79-6423

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ABBY GAIL LASSITER,
Petitioner,

v.

DEPARTMENT OF SOCIAL SERVICES OF
DURHAM COUNTY, NORTH CAROLINA,

Respondent.

(IN THE MATTER OF WILLIAM L. LASSITER)

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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I. THE TRIAL TRANSCRIPT IS NOT SUBREPTITIOUSLY BEFORE THIS COURT.

Respondent has alleged that petitioner acted subpretitiously in referring to an official transcript of the trial record. [Respondent's Brief in Opposition, p. 1]. Petitioner contends that the trial transcript is not subreptitiously before this Court. In support of her contention, she alleges: (1) that an official trial transcript may be used for illustrative purposes, and (2) that the respondent and the North Carolina Court of Appeals are estopped from objecting to petitioner's use of the official trial transcript.

A. The Trial Transcript May Be Used for Illustrative Purposes.

Petitioner contends that she may use an official trial transcript to illustrate the need for court appointed counsel in proceedings to terminate the parental rights of indigent parents. To support this contention, petitioner shows: (1) that in the landmark case of Gideon v. Wainwright, 372 U.S. 335, 9 L.Ed.2d 799 (1963), this Court allowed an official trial transcript to be used for illustrative purposes even though there were questions as to whether it was actually before the Flordia Supreme Court, and (2) that, like Gideon, petitioner's references to the official transcript were for illustrative purposes only.

1. In the landmark case of Gideon v. Wainwright, this Court allowed the trial transcript to be used for illustrative purposes even though there were questions as to whether it was actually before the Florida Supreme Court.

Clarence Earl Gideon filed a Petition for a Writ of Habeas Corpus to the Supreme Court of Florida without a trial transcript. [App. III, p. 2]. The Petition was denied without an opinion; Gideon filed a Writ of Certiorari to the Supreme Court of Florida; this Honorable Court granted that writ. [Id.], p. 3].

Counsel for Gideon used the trial transcript to illustrate the need for court appointed counsel for indigents during felony proceedings [App. II]; he included the trial transcript in his designation for printing [App. III, p. 3].

The respondent objected on the basis that "the Florida Court did not have before it the transcript of [the] trial proceedings . . . ." [App. III, p. 4]. This Court overruled respondent's objection, thus allowing the trial transcript to be included in the designated record and used for illustrative purposes. [Id.]

2. Petitioner's references to the trial transcript were for illustrative purposes only.

Like Gideon, petitioner's references to the trial transcript were to illustrate the need for court appointed counsel in proceedings to terminate the parental rights of indigent parents. [Petitioner's Writ of Certiorari to the North Carolina Court of Appeals, p. 19]. Petitioner's illustrative use of the transcript is clearly indicated by the language of her Petition for Writ of Certiorari:

> "Many of the difficulties heretofore, which occur frequently in termination cases when a parent is unrepresented by counsel, are typified in this case." Id.

B. Respondent and the North Carolina Court of Appeals Are Estopped From Objecting to Petitioner's Use Of An Official Trial Transcript, For Any Purpose.

As alleged by respondent, the parties did agree to a stipulated record on appeal.[1/] Yet, the respondent and the North Carolina Court of Appeals relied on facts outside the stipulated record to support their contention that procedural due process was granted in this case. Respondent relied upon such facts in his brief to the North Carolina Court of Appeals, and in his Brief in Opposition to this Court; the North Carolina Court of Appeals relied upon such facts in rendering its final decision. Neither the respondent nor the North Carolina Court of Appeals cited the source of their reliance.

Petitioner contends that this reliance estoppes the respondent and the North Carolina Court of Appeals from objecting to her use of the facts outside the stipulated record (especially when the facts used are from an official transcription of the trial court proceedings).

[1/] See the certified Record on Appeal transmitted to this Court by the North Carolina Court of Appeals.

1. Respondent relied upon facts outside the stipulated record.

In his brief to the North Carolina Court of Appeals, respondent contended that procedural due process was met in this case because notice and an opportunity to be heard were granted to petitioner. [Appellee's (Respondent's) Brief, p. 2]. To support his contention, respondent argued that petitioner was properly served and summoned, and that "[s]he was, in fact, present at the hearing and testified." [Id.] However, the stipulated record does not disclose that petitioner actually testified.[2/]

In Respondent's Brief in Opposition, respondent contends that petitioner "...with no difficulty and no cost..." was able to obtain counsel and that "...had she inquired, the Legal Aid attorneys in Durham would have represented her...." [Id. pp.4&5]. The factual basis for these speculations cannot be found in either the stipulated record or the trial record.[3/]

2. The North Carolina Court of Appeals relied upon facts outside the stipulated record.

During the oral argument, the North Carolina Court of Appeals solicited information from respondent's counsel that was not part of the stipulated record.[4/] [Respondent's Brief in Opposition, p. 1]. The Court of Appeals later relied upon that information in its opinion:

> "...[petitioner] took no action to obtain counsel, and appeared at the hearing only because counsel for [respondent] caused her to be broguht to Durham for the hearing." In the Matter of William L. LASSITER, 43 N.C. App. 525, 259 S.E.2d 336, 337 (1979).

[2/] See App. I; App. I is a statement of the case according to the stipulated record. The facts are recited in chronological order using only the documents found in the stipulated record on appeal before the North Carolina Court of Appeals.

[3/] See App. I and App. IV; App. IV is an official copy of the trial record.

[4/] Petitioner contends that the only competent source of such information is the trial record, notwithstanding the fact that respondent's attorney was able to answer the questions from personal knowledge since he actually participated in the trial court proceedings.

The North Carolina Court of Appeals relied upon additional facts outside the stipulated record to support its decision that procedural due process was not denied in this case:

> "At issue is whether due process requires the state to appoint and pay counsel to represent indigents in this situation. The requirements of procedural due process were certainly met in this case. [Petitioner] had ample notice of the hearing, was actually present when it was held, and was allowed to testify and cross-examine [respondent's] witnesses. See State v. Smith, 265 N.C. 173, 143 S.E.2d 293 (1965)." Id.

The stipulated record does not disclose that petitioner was allowed to cross-examine respondent's sole witness or to testify. [App. I].

CONCLUSION

The official transcript of the trial court proceeding is not subreptitiously before this Court--to the contrary, it was offered to illustrate rather than conceal the facts. Furthermore, respondent cannot deny the Court access to this official source of facts especially when respondent and the North Carolina Court of Appeals relied upon facts outside of the record on appeal without citing their source, official or otherwise.

Respectfully submitted this the 30th day of August, 1980.

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